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PBGC proposes easing reporting, closing premium loopholes

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Proposed changes to several PBGC regulations aim to improve reporting on reportable events, section 4010, plan terminations, and premium filing requirements. The changes would curtail the use of certain spinoff and merger strategies some employers have used to minimize premium obligations.

Background

PBGC collects information from plan sponsors to identify activities that may present a risk to the plan termination program (reportable events), financial information from plan sponsors with plan funding ratios below specified levels (section 4010 filings), distribution information from plan administrators of terminated plans (Form 501), and headcount information that measures annual premium obligations (Comprehensive Premium Filing). PBGC regulations describe obligations, waivers, exceptions, and more and are periodically updated as questions emerge and experience develops.

Proposed changes to four regulations

PBGC is proposing to update several regulations to clarify original intent and ease plan reporting burden based on ongoing dialog with employers and practitioners.

Reportable events and certain other notification requirements. PBGC proposes to eliminate duplicative reporting of active participant reductions so that employers who report single cause events will not need to double count those terminations when assessing attrition events at the end of the year. However, PBGC would clarify that they do want reports of single cause events as they occur so they can assess any possible threat to plan solvency. The rules for coordinating the reporting of a single cause event under the reportable event rules with the reporting of that event under section 4062(e) (on cessation of business operations) or 4063(a) (withdrawal of a substantial employer from a multiple employer plan) would change to clarify that the waiver under the reportable event rules would only apply if the 4062(e) or 4063(a) event is reported by the reportable events deadline — within 30 days after the event occurs (rather than the 60-day deadline that would apply to reporting under 4062(e) or 4063(a)). The proposal would also waive reporting of a 25% drop in active participants over two-years because PBGC finds that a 20% drop in active participants over a one-year period already provides them with enough information.

Other sections of the reportable event regulations that would be modified include:

- Expanding the definition of reportable liquidations to include when a member of the sponsor's controlled group resolves to cease all revenue generating business operations, sell substantially all its assets, or otherwise liquidate (including liquidation into another controlled group member). Under the proposal, such a resolution can be deemed to have occurred without a formal resolution — such as when a sole proprietor decides to liquidate his company without having to formally declare his intention to do so.
- Requiring reporting when an entity ceases to be a contributing sponsor (even if it doesn't result in a change of the sponsor's controlled group). The proposal clarifies that a reorganization that involves a change in identity, form, or place of organization would now be reportable if it involves a contributing plan sponsor (as opposed to a noncontributing controlled group member).
- Clarifying that the two month limit on nonreportable delays for an "inability to pay benefits when due" event excludes an inability to make payment as a result of the need to verify a participant's eligibility for benefits.
- Emphasizing that the low default risk commercial measures waiver based on evidence of adequate security needs to be based on third-party financial information, not information a company itself generates.

Annual financial and actuarial information reporting (section 4010). PBGC proposes to eliminate a requirement to submit individual financial information for each controlled group member if consolidated financial statements are submitted, add a new reporting waiver, and clarify others. In addition, the proposed changes would provide guidance on assumptions for valuing benefit liabilities for cash balance plans.

Termination of single-employer plans. PBGC's proposal would provide more time to submit a complete PBGC Form 501 in the standard termination process if a certification is provided within the 30-day statutory reporting period after a final distribution is made. This would allow plan administrators an additional 30 days to assemble and submit information on individual distributions.

Premium rates. PBGC's proposal would modify their regulatory language to reflect the original intent behind certain exceptions and to curtail misuse. For example, the regulation would specifically state that a plan does not qualify for the variable rate premium exemption for the year in which it completes a standard termination if it engages in a non-*de minimis* spinoff in the same year. In addition, the participant count date special rule for transactions (e.g., mergers and spinoffs) and the circumstances under which the premium is prorated for a short plan year resulting from a standard termination would be modified so that premiums for large groups of participants could not be avoided through manipulation of these exceptions.

Buck comment. PBGC had previously posted informal guidance on their website to warn about the misuse of their regulatory exception for spinoff-terminations. In short: “The federal common law under ERISA and cases that look to the substance and not the form of a transaction suggest that this two-step transaction, and similar types of transactions, should be disregarded and premiums assessed as if such transaction had not occurred. We are especially skeptical of this strategy because it seems plausible that some plans could engage in this sort of two-step transaction year after year.”

Comments and effective date

PBGC does not specify a proposed effective date for the changes. However, PBGC asks that comments be submitted by August 26 (60 days from publication in the federal register) to be assured of consideration.

In closing

Plan sponsors should be aware of these proposed changes and consider reporting based on refinements that are in keeping with what PBGC describes as mere clarifications. Sponsors considering the use of strategies to minimize premium payments now have an additional warning from PBGC that such strategies may not be effective.

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